

No. 46107-2-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Toribio Amaro-Sotelo,**

Appellant.

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Cowlitz County Superior Court Cause No. 12-1-01402-4

The Honorable Judge James Stonier

**Appellant's Opening Brief**

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### **ISSUES AND ASSIGNMENTS OF ERROR**

1. Mr. Amaro-Sotelo's conviction infringed his right to remain silent, his right to due process, and his right to a jury trial.
2. Mr. Amaro-Sotelo's conviction was entered in violation of his Fifth, Sixth, and Fourteenth Amendment rights.
3. Mr. Amaro-Sotelo's conviction was entered in violation of Wash. Const. art. I, §§3, 21, and 22.
4. An officer improperly commented on Mr. Amaro-Sotelo's exercise of his right to remain silent.
5. An officer improperly commented on Mr. Amaro-Sotelo's exercise of his right to a jury trial.
6. An officer improperly commented on Mr. Amaro-Sotelo's exercise of his right to have the government prove his guilt.
7. The officer's comment improperly encouraged the jury to infer Mr. Amaro-Sotelo's guilt based on his exercise of his right to a jury trial and his right to have the government prove his guilt.

**ISSUE 1:** Police testimony encouraging the jury to infer guilt based on an accused person's exercise of his/her constitutional rights violates those rights. Here, an officer testified that Mr. Amaro-Sotelo "smirked" as he said that the state would have to prove the charges against him. Did the officer's comment violate Mr. Amaro-Sotelo's state and federal constitutional rights to remain silent, to due process, and to a jury trial?

8. Mr. Amaro-Sotelo's conviction was entered in violation of his Sixth and Fourteenth Amendment right to confront adverse witnesses.
9. The jury's verdict improperly rested on testimonial hearsay introduced without an opportunity for cross-examination.
10. The court erred by admitting Ex. 12.

**ISSUE 2:** A court may not admit a certification attesting to the existence of a fact unless the accused has the opportunity to cross-examine its creator. Here, the court admitted a printout –

created in anticipation of trial – claiming that Mr. Amaro-Sotelo had been convicted of a crime barring his possession of guns. Was the UPF charge entered in violation of Mr. Amaro-Sotelo’s right to confront adverse witnesses under the Sixth and Fourteenth Amendments?

11. The court abused its discretion by admitting Ex. 12 without any factual foundation.

12. Exhibit 12 was admitted in violation of RCW 5.44.010.

**ISSUE 3:** Although certified copies of court records or proceedings are self-authenticating, certified documents that are not official court records or proceedings are not admissible under the rule. Here, the court admitted a “certified” printout from an unidentified computer system attesting that Mr. Amaro-Sotelo had a prior misdemeanor conviction. Did the court abuse its discretion by admitting a non-court-record without any factual foundation regarding its origin or accuracy?

13. Defense counsel provided ineffective assistance in violation of Mr. Amaro-Sotelo’s Sixth and Fourteenth Amendment right to counsel.

14. Defense counsel unreasonably failed to object to prejudicial evidence admitted in violation of his client’s right to confront adverse witnesses.

15. Mr. Amaro-Sotelo was prejudiced by his attorney’s deficient performance.

**ISSUE 4:** Defense counsel provides ineffective assistance by failing to object to inadmissible evidence absent a valid tactical justification. Here, Mr. Amaro-Sotelo’s attorney failed to object to prejudicial testimonial hearsay in violation of his client’s right to confront adverse witnesses. Did defense counsel’s failure to object deprive Mr. Amaro-Sotelo of his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

16. The court erred by giving jury instruction number 7.

17. Jury instruction 7 permitted the jury to question Mr. Amaro-Sotelo’s credibility on improper grounds, in violation of his Sixth and Fourteenth Amendment rights to the presumption of innocence and to present a defense.



**ISSUE 5:** Only prior convictions for crimes of dishonesty and felonies that are probative of credibility can be used to impeach a witness's credibility. Here, the court instructed the jury in a manner permitting them to question Mr. Amaro-Sotelo's credibility based on his prior conviction for misdemeanor assault. Did the court's instruction violate Mr. Amaro-Sotelo's Sixth and Fourteenth Amendment rights to the presumption of innocence and to present a defense?

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

Toribio Amaro-Sotelo worked as a mechanic from his trailer. RP 428. He fixed up old cars and then sold them. RP 428. He occasionally bought and sold car parts from Toby Enfield. RP 127-28, 429-30. Enfield had also bought several cars from Mr. Amaro-Sotelo. RP 128-29, 428.

Enfield also worked as a confidential informant for a police drug task force. RP 91, 155. Enfield was able to avoid prison on a drug charge because of his work as an informant. RP 91-92, 136. The police allowed Enfield to name his own targets. RP 97, 135. Enfield listed Mr. Amaro-Sotelo as someone from whom he could do controlled buys of drugs. RP 97. The police considered Mr. Enfield a “wheeler dealer.” RP 185, 214, 338.

Enfield’s contract as an informant was eventually terminated because of misconduct. RP 93, 340. During a controlled buy in a different investigation, he retained excess buy money by concealing it in his pant leg. RP 342. He also took drugs for personal use during a controlled buy. RP 339.

Enfield claimed he’d purchased drugs from Mr. Amaro-Sotelo during four buys. RP 98-125. During one of the interactions, he also claimed to have bought a gun from Mr. Amaro-Sotelo. RP 114-17.

During another, he stopped to talk to other residents of the trailer park before bringing the drugs he'd allegedly purchased to his police handlers. RP 131, 190.

Eventually, the police showed up with a warrant to search Mr. Amaro-Sotelo's trailer. RP 331. They did not find any drugs. RP 335.

The state charged Mr. Amaro-Sotelo with four counts of delivery and one count of unlawful possession of a firearm. CP 19-21. The state also alleged that the deliveries had taken place within a school bus stop zone. CP 19-21.

One officer testified about executing the search warrant on Mr. Amaro-Sotelo's trailer. RP 331-34. Mr. Amaro-Sotelo told the officer that he did not sell drugs. RP 333. The officer said that he did not believe him. RP 333. The officer testified that, in response, "[Mr. Amaro-Sotelo] kind of smirked or smiled and looked up at the sky and said, 'Well, then, you're going to have to prove it.'" RP 334.

To support the unlawful possession of a firearm charge, the state alleged that Mr. Amaro-Sotelo had a 2001 conviction for fourth degree assault domestic violence. RP 313; Ex 12. The prosecution did not offer a judgment and sentence or any other court document to prove that conviction. RP 313-14. Instead, the state offered a printout from a computer system. Ex. 12. The printout had been created in June of 2012,

a few months after the controlled buys were completed. An officer “interpreted” the document for the jury, and told them it meant Mr. Amaro-Sotelo had been convicted of fourth-degree assault, domestic violence finding. RP 313; Ex 12.

The court instructed the jury that it could consider prior criminal convictions when determining credibility:

You may consider evidence that a witness has been convicted of a crime only in deciding what weight or credibility to give to the testimony of that witness and for no other purpose.  
CP 31.

The instruction did not limit itself to any particular witness or type of criminal conviction. CP 31. The court also instructed jurors that “[c]ertain evidence has been admitted for a limited purpose.” In particular, the instruction told jurors that:

The State has offered Exhibits 12, 14 and 15 as evidence of element two of Count V. You may consider this evidence solely for this purpose and for no other purpose.  
CP 32.

Although the court limited the jury’s consideration of Exhibits 12, 14, and 15, it did not explicitly limit the jury’s consideration of Mr. Amaro-Sotelo’s assault conviction. CP 22-48.

The jury convicted Mr. Amaro-Sotelo of all five counts. RP 539. The court gave Mr. Amaro-Sotelo an exceptional sentence downward. RP 553; CP 74. The court found that the standard range sentence was clearly

excessive in light of the fact that the state controlled the number and location of the drug sales. RP 553; CP 74.

This timely appeal follows. CP 76.

## **ARGUMENT**

### **I. AN OFFICER IMPROPERLY COMMENTED ON MR. AMARO-SOTELO'S EXERCISE OF HIS RIGHTS TO REMAIN SILENT, TO A JURY TRIAL, AND TO HAVE THE STATE PROVE HIS GUILT.**

#### **A. Standard of Review.**

Constitutional errors are reviewed *de novo*. *State v. Silva*, 119 Wn. App. 422, 428, 81 P.3d 889 (2003). Improper comments on an accused person's exercise of a constitutional right constitute manifest error affecting a constitutional right and may be raised for the first time on review. *State v. Holmes*, 122 Wn. App. 438, 445, 93 P.3d 212 (2004); RAP 2.5(a)(3).

#### **B. An officer's comment on Mr. Amaro-Sotelo's choice to force the state to prove the charges against him violated his constitutional rights to remain silent, to due process, and to a jury trial.**

Both the federal and state constitutions protect the accused's right to silence. U.S. Const. Amends. V, XIV; Wash. Const. art. I, § 9. The privilege against self-incrimination is liberally construed. *Holmes*, 122 Wn. App. at 443.

The state and federal constitutions also both guarantee the right to a jury trial. U.S. Const. Amends. VI; XIV; art. I, §§ 21, 22; *State v. Williams-Walker*, 167 Wn.2d 889, 895, 225 P.3d 913 (2010). The state constitutional right “shall remain inviolate” and is more extensive than the federal right. Art. I, §§ 21, 22; *Williams-Walker*, 167 Wn.2d at 895.

Due process entitles an accused person to require the state to prove each element of each charge against him/her. *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); U.S. Const Amend. XIV; art. I, § 3.

An accused person’s exercise of his/her constitutional rights is not evidence of guilt. *Silva*, 119 Wn. App. at 428-29. Due process prohibits the state from inviting the jury to infer that the accused is more likely guilty because of the exercise of his/her constitutional rights. *Id.*

The *Miranda* warnings also carry an implicit assurance that the accused’s silence will not carry a penalty. *Silva*, 119 Wn. App. at 429. Thus, telling the jury that the accused invoked his rights after *Miranda* “violates fundamental due process by undermining [that] implicit assurance.” *Id.*

Accordingly, testifying police officers may not comment on an accused person’s exercise of his/her constitutional rights. *Holmes*, 122 Wn. App. at 445. A direct comment – explicitly relaying to the jury that the accused chose to exercise a right – is always constitutional error. *Id.*

An indirect comment is also constitutional error if it is intentionally elicited by the state. *Id.* at 445-46.

An inference of guilt resting on exercise of a constitutional right “always adds weight to the prosecution’s case and is always, therefore, unfairly prejudicial.”<sup>1</sup> *Silva*, 119 Wn. App. at 429. An improper comment on the exercise of a constitutional right requires reversal unless the state can prove that the comment was harmless beyond a reasonable doubt. *Id.* at 446.

Here, a police witness testified that Mr. Amaro-Sotelo “smirked” before saying that the state was going to have to prove the charges against him. RP 334. This was after Mr. Amaro-Sotelo had been *Mirandized*. RP 76.

The officer’s statement was a direct comment on Mr. Amaro-Sotelo’s exercise of his right to remain silent. *Holmes*, 122 Wn. App. at 445. When the officer confronted Mr. Amaro-Sotelo with the charges against him, he had only two choices: confess or exercise his right to require the state to prove the allegations. The officer’s testimony encouraged the jury to draw a negative inference from Mr. Amaro-

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<sup>1</sup> Once such an improper comment has been made, “the bell is hard to unring.” *Holmes*, 122 Wn. App. at 446. The situation puts defense counsel in the difficult position of gambling on whether to ask for a curative instruction “—a course of action which frequently does more harm than good” — or ignoring the comment. *Id.*

Sotelo's refusal to incriminate himself. *Silva*, 119 Wn. App. at 428-29.

The officer's testimony on Mr. Amaro-Sotelo's statement violated due process by breaking the *Miranda* warnings' implicit assurance that his silence would not carry a penalty. *Silva*, 119 Wn. App. at 429.

The officer's testimony was also a direct comment on Mr. Amaro-Sotelo's intent to exercise his rights to due process and to a jury trial. *Holmes*, 122 Wn. App. at 445. Mr. Amaro-Sotelo's statement expressed his desire to have any charges resolved through trial, rather than through a confession and guilty plea.

The officer's comment created a manifest error affecting Mr. Amaro-Sotelo's rights to remain silent, to a jury trial, and to due process; accordingly, it can be reviewed for the first time on review. RAP 2.5(a)(3); *Holmes*, 122 Wn. App. at 445.

Even if the comment was only indirect, it still requires reversal. *Id.* This is because it was in direct response to questioning by the prosecutor. *Id.*; RP 334. The state explicitly sought the admission of Mr. Amaro-Sotelo's statement in a pretrial CrR 3.5 hearing. The prosecutor also intentionally elicited the statement in direct examination. RP 72-88, 334. Rather than a spontaneous comment by the testifying officer, the comment on Mr. Amaro-Sotelo's exercise of his rights was a planned part of the prosecution strategy.



The state cannot prove that the officer's improper comment was harmless beyond a reasonable doubt. *Silva*, 119 Wn. App. at 446. The testimony was not relevant to any element at issue. It had no probative value other than to encourage the jury to infer guilt based on Mr. Amaro-Sotelo's exercise of his constitutional rights. The officer's testimony that Mr. Amaro-Sotelo "smirked" before he said that the state would have to prove the charges against him adds to the prejudice. RP 334. The "smirk" invited the jury to conclude that Mr. Amaro-Sotelo's invocation of his rights was actually an admission of guilt. It also suggests that Mr. Amaro-Sotelo was smug about his constitutional rights or somehow planned to exercise them in an improper manner. Mr. Amaro-Sotelo was prejudiced by the officer's improper comment on his rights to remain silent, to a jury trial, and to due process. *Id.*

The officer's improper comment violated Mr. Amaro-Sotelo's rights to remain silent, to a jury trial, and to due process. *Silva*, 119 Wn. App. at 428-29; *Holmes*, 122 Wn. App. at 445. Mr. Amaro-Sotelo's convictions must be reversed. *Id.*

**II. THE COURT VIOLATED MR. AMARO-SOTELO'S SIXTH AND FOURTEENTH AMENDMENT RIGHT TO CONFRONT ADVERSE WITNESSES.**

**A. Standard of Review.**

A denial of the Sixth Amendment right to confront adverse witnesses is reviewed *de novo*. *State v. Jasper*, 174 Wn.2d 96, 108, 271 P.3d 876 (2012). Such an error requires reversal unless the state can show that it was harmless beyond a reasonable doubt. *Id.* at 117. Manifest error affecting a constitutional right may be raised for the first time on appeal. RAP 2.5(a)(3).<sup>2</sup>

**B. The admission of a certification attesting to the existence of a prior assault conviction violated Mr. Amaro-Sotelo's confrontation right because he was not permitted to cross-examine the certification's creator.**

The state and federal constitutions guarantee an accused person the right to confront adverse witnesses. U.S. Const. Amends. VI, XIV; art. I, § 22. The Confrontation Clause prohibits the admission of testimonial statements by a non-testifying witness unless the witness is unavailable and the accused has had a prior opportunity for cross-examination.

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<sup>2</sup> Division I has held that a violation of the Confrontation Clause cannot be raised for the first time on appeal. *State v. O'Cain*, 169 Wn. App. 228, 232, 279 P.3d 926 (2012). Division III has held that a confrontation error can be raised for the first time on appeal, subject to harmless error analysis. *State v. James*, 138 Wn. App. 628, 641, 158 P.3d 102 (2007). If Mr. Amaro Sotelo's confrontation error is waived, his defense attorney's failure to preserve the issue constituted ineffective assistance of counsel, as argued elsewhere in this brief.

*Jasper*, 174 Wn.2d at 109 (citing *Crawford v. Washington*, 541 U.S. 36, 59, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)).

The state bears the burden of establishing that a statement is non-testimonial and, therefore, admissible even absent an opportunity to cross-examine. *State v. Hurtado*, 173 Wn. App. 592, 600, 294 P.3d 838 (2013) *review denied*, 177 Wn.2d 1021, 304 P.3d 115 (2013).

Testimony is “[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.” *Crawford*, 541 U.S. at 51. A statement is testimonial if it is “created for use in a criminal proceeding.” *Jasper*, 174 Wn.2d at 115 (citing *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009)).

Certifications attesting to the existence or nonexistence of essential facts are testimonial. *Jasper*, 174 Wn.2d at 114-15; *Melendez-Diaz*, 557 U.S. at 2532.

Here, the court admitted a printout attesting that Mr. Amaro-Sotelo had a prior conviction for fourth-degree assault domestic violence. Ex. 12; RP 313-14. The witness who created the printout did not testify at trial. RP 313-14.

Unlike a Judgment and Sentence, the printout had no legal effect.<sup>3</sup>

Ex 12. Rather, it simply purported to summarize the content of other records. Ex 12. The printout was testimonial because its creator certified the existence of a prior conviction. *See Jasper*, 174 Wn.2d at 114-15.

In addition, the printout was created for trial. The printout was created in June 2012, eleven years after the referenced conviction but only a few months after the controlled buys targeting Mr. Amaro-Sotelo. Ex 12. The exhibit is testimonial because it was created for use in Mr. Amaro-Sotelo's criminal prosecution, not as part of the ordinary business of the court. *Jasper*, 174 Wn.2d at 115.

The introduction of the printout violated Mr. Amaro-Sotelo's confrontation right because he did not have the opportunity to cross-examine the document's creator. *Id.* It therefore creates a manifest error affecting a constitutional right and may be raised for the first time on appeal. RAP 2.5(a)(3).

The state cannot prove that this violation of Mr. Amaro-Sotelo's confrontation right was harmless beyond a reasonable doubt. *Jasper*, 174

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<sup>3</sup> Division I has held that a certified copy of a judgment and sentence is not testimonial for confrontation clause purposes. *State v. Benefiel*, 131 Wn. App. 651, 656, 128 P.3d 1251 (2006). *Benefiel* does not control here because the state did not present a judgment and sentence from Mr. Amaro-Sotelo's alleged prior conviction. Rather, the state offered only a rudimentary printout suggesting that such a document existed. Ex 12.

Wn.2d at 117. Beyond the printout, the state did not present any other evidence of a prior conviction. Nor did the prosecution introduce evidence of some other bar to gun ownership or possession. *See RP generally*. Absent the confrontation clause violation, the state would not have been able to prove that Mr. Amaro-Sotelo unlawfully possessed a firearm. Mr. Amaro-Sotelo was prejudiced by the violations of his right to confront adverse witnesses. *Id.*

The court violated the right to confront adverse witnesses by admitting a testimonial certification when Mr. Amaro-Sotelo never had an opportunity to cross-examine the document's creator. *Jasper*, 174 Wn.2d at 114-15. Mr. Amaro-Sotelo's unlawful possession of a firearm conviction must be reversed. *Id.* at 120.

### **III. THE COURT ERRED BY ADMITTING HEARSAY IN THE ABSENCE OF AN ADEQUATE FACTUAL FOUNDATION.**

#### **A. Standard of Review.**

Evidentiary error is reviewed for abuse of discretion. *Veit, ex rel. Nelson v. Burlington N. Santa Fe Corp.*, 171 Wn.2d 88, 99, 249 P.3d 607 (2011). A court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds. *Id.* The erroneous admission of evidence requires reversal if, within a reasonable probability, it

materially affected the outcome of the trial. *State v. Acosta*, 123 Wn. App. 424, 438, 98 P.3d 503 (2004).

- B. The court abused its discretion by overruling the defense objection and admitting the printout certifying that Mr. Amaro-Sotelo had a prior conviction.

Certified and sealed copies of court “records and proceedings of a court” are admissible without foundational testimony. RCW 5.44.010. Accordingly, a certified copy of a judgment and sentence, transcript, or other court document is admissible absent a foundational witness to prove a prior conviction. *See e.g. Benefiel*, 131 Wn. App. at 655.

In this case, the prosecution did not offer a judgment and sentence, transcript, or any other court document to prove that Mr. Amaro-Sotelo had a conviction prohibiting him from possessing guns. *See RP generally*. Instead, the prosecution offered a printout from a computer system alleging that Mr. Amaro-Sotelo had a conviction from 2001. Ex 12. The printout was created in June, 2012. Ex 12.

No witness testified regarding who created the printout, how it was created, what system it came from, or whether it was accurate. RP 313-14. Accordingly, Mr. Amaro-Sotelo objected on foundation grounds. RP 314.

The printout was not admissible as a court “record or proceeding.” RCW 5.44.010. It was not signed by a judge or by Mr. Amaro-Sotelo. Ex

12. Unlike a judgment and sentence, the printout had no legal effect. Ex 12. Unlike court minutes or a transcript, it did not represent documentation of the proceedings of a court. Ex 12. Instead, the printout baldly stated that a court had found Mr. Amaro-Sotelo guilty of misdemeanor assault, with a domestic violence finding. Ex 12. The court erred by overruling Mr. Amaro-Sotelo's foundational objection. RCW 5.44.010.

Mr. Amaro-Sotelo was prejudiced by the improper admission of the printout document. *Acosta*, 123 Wn. App. at 438. Without the exhibit alleging the 2001 conviction, the state would have been unable to show that Mr. Amaro-Sotelo was not legally entitled to possess firearms. There is a reasonable probability that the erroneous admission of the document materially affected the outcome of Mr. Amaro-Sotelo's trial. *Id.*

The court abused its discretion by admitting the printout, which was not an official court record, without any foundational evidence. RCW 5.44.010. Mr. Amaro-Sotelo's unlawful possession of a firearm conviction must be reversed. *Acosta*, 123 Wn. App. at 438.

**IV. MR. AMARO-SOTELO RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.**

**A. Standard of Review.**

Ineffective assistance of counsel is an issue of constitutional magnitude that can be raised for the first time on appeal. *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); RAP 2.5(a).

An ineffective assistance claim presents a mixed question of law and fact, reviewed *de novo*. *In re Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wn. App. 29, 146 P.3d 1227 (2006). Reversal is required if counsel's deficient performance prejudices the accused. *Kylo*, 166 Wn.2d at 862 (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

**B. Counsel provided ineffective assistance by failing to object on confrontation grounds to the printout of Mr. Amaro-Sotelo's alleged criminal history.**

The right to counsel includes the right to the effective assistance of counsel. U.S. Const. Amends. VI, XIV; *Strickland*, 466 US at 685.

Counsel's performance is deficient if it falls below an objective standard of reasonableness. U.S. Const. Amends. VI, XIV; *Kylo*, 166 Wn.2d at 862. Deficient performance prejudices the accused when there is a reasonable probability that it affected the outcome of the proceeding. *Id.*



Counsel provides deficient performance by failing to object to inadmissible evidence absent a valid strategic reason. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998) (citing *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995)). Reversal is required if an objection would likely have been sustained and the result of the trial would have been different without the inadmissible evidence. *Id.*

Defense counsel unreasonably failed to object on confrontation grounds to a printout of Mr. Amaro-Sotelo's alleged criminal history. *Saunders*, 91 Wn. App. at 578; RP 313-14; Ex 12.

Counsel had no valid strategic reason for failing to object on confrontation grounds. *Id.* The document had no information that was helpful to the defense case and, if believed, helped the state prove an element of unlawful possession of a firearm. Ex 12. Indeed, counsel did object on foundation and relevance grounds. RP 314. This shows that Mr. Amaro-Sotelo's attorney knew that the document was harmful to the defense. Defense counsel had no tactical justification for failing to object to the admission of the printout.

Second, a confrontation objection would likely have been sustained. *Saunders*, 91 Wn. App. at 578. As outlined above, the printout represented a testimonial certification attesting to the existence of a public record. Mr. Amaro-Sotelo never had the opportunity to confront its

creator. *Jasper*, 174 Wn.2d at 114-15. Accordingly, its admission violated Mr. Amaro-Sotelo's right to confront adverse witnesses. *Id.* Defense counsel provided deficient performance by failing to object to the admission of the exhibit in violation of his client's constitutional rights. *Id.*; *Saunders*, 91 Wn. App. at 578.

Finally, the outcome of Mr. Amaro-Sotelo's trial would have been different without the admission of the printout. *Saunders*, 91 Wn. App. at 578. The document was the state's only evidence indicating that Mr. Amaro-Sotelo did not have the right to possess firearms. *See RP generally*. Without it, the jury would have been unable to convict him for unlawful possession of a firearm. Mr. Amaro-Sotelo was prejudiced by his counsel's deficient performance. *Kyllo*, 166 Wn.2d at 862.

Defense counsel unreasonably failed to object to Ex. 12 on confrontation grounds. This deficient performance prejudiced Mr. Amaro-Sotelo, because it allowed the prosecution to establish the predicate offense for the UPF charge. *Id.*; *Jasper*, 174 Wn.2d at 114-15; *Saunders*, 91 Wn. App. at 578. Mr. Amaro-Sotelo's unlawful possession of a firearm conviction must be reversed. *Id.*

**V. THE COURT UNDERMINED THE PRESUMPTION OF MR. AMARO-SOTELO'S INNOCENCE AND INFRINGED HIS RIGHT TO PRESENT A DEFENSE.**

**A. Standard of Review.**

Jury instructions are reviewed *de novo*. *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 860, 281 P.3d 289 (2012).

Instructions that violate an accused person's constitutional rights create manifest error and may be raised for the first time on appeal. RAP 2.5(a)(3).

**B. The court erroneously suggested that jurors could consider Mr. Amaro-Sotelo's assault conviction in determining the weight or credibility of his testimony.**

The presumption of innocence is the "bedrock upon which the criminal justice system stands." *State v. Evans*, 163 Wn. App. 635, 643, 260 P.3d 934 (2011). The due process clause (along with the Sixth Amendment right to compulsory process) also guarantees criminal defendants a meaningful opportunity to present a complete defense. U.S. Const. Amends. VI, XIV; Wash. Const. art. I, § 22; *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006). The right to present a defense is also "a fundamental element of due process of law." *Washington v. Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967).

A court's instructions are improper if they inaccurately state the law or mislead the jury. *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). An improper jury instruction affecting a constitutional right requires reversal unless the state can demonstrate beyond a reasonable doubt that it did not contribute to the verdict. *State v. Montgomery*, 163 Wn.2d 577, 600, 183 P.3d 267 (2008).

Evidence of a prior conviction is only admissible to impeach a witness's credibility if (a) the crime is punishable by imprisonment for more than a year and the court finds it probative of credibility or (b) the crime involves dishonesty or a false statement. ER 609(a). The conviction must also have occurred within ten years of the time it is used to impeach credibility. ER 609(b).

The state did not present evidence that Mr. Amaro-Sotelo had any prior convictions for felonies or crimes of dishonesty. *See RP generally*. Mr. Amaro-Sotelo's only alleged prior conviction was for misdemeanor assault and had occurred more than ten years before the current offenses. Ex 12. Still, the court instructed the jury that it could consider Mr. Amaro-Sotelo's prior conviction "in deciding what weight or credibility to give" his testimony. CP 31.

But Mr. Amaro-Sotelo's misdemeanor assault conviction was not admissible to impeach his credibility. ER 609. The court's instruction

requires reversal because it inaccurately stated the law and misled the jury.<sup>4</sup> *Bennett*, 161 Wn.2d at 307.

This instructional error can be raised for the first time on appeal because the error is manifest and affected Mr. Amaro-Sotelo's constitutional rights to present a defense and to the presumption of innocence. RAP 2.5(a)(3); *Evans*, 163 Wn. App. at 643; *Holmes*, 547 U.S. at 324. Mr. Amaro-Sotelo exercised his right to testify at trial. RP 427-38. The court's instruction called his credibility into question based on improper grounds. The instruction placed Mr. Amaro-Sotelo's testimony on unequal footing with the testimony of those prosecution witnesses who did not have prior convictions. This undermined his presumption of innocence and opportunity to present a defense.

Mr. Amaro-Sotelo was prejudiced by the court's improper instruction. *Montgomery*, 163 Wn.2d at 600. Mr. Amaro-Sotelo's testimony was the backbone of his defense. The court's instruction undermined his credibility, and thus had the effect of calling into question his entire theory of the case. The state cannot demonstrate beyond a

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<sup>4</sup> The police informant who testified at trial did have prior convictions for crimes of dishonesty. RP 125. But the instruction did not limit itself to crimes of dishonesty or to Enright's testimony. CP 31. The plain language of the instruction was equally applicable to Mr. Amaro-Sotelo's prior misdemeanor conviction and testimony. CP 31.

reasonable doubt that the improper instruction did not contribute to the jury's verdict.<sup>5</sup> *Id.*

The court violated Mr. Amaro-Sotelo's presumption of innocence and right to present a defense. ER 609; *Evans*, 163 Wn. App. at 643; *Holmes*, 547 U.S. at 324. Mr. Amaro-Sotelo's convictions must be reversed. *Id.*

### **CONCLUSION**

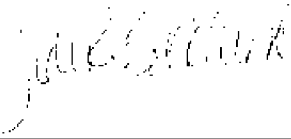
An officer improperly commented on Mr. Amaro-Sotelo's exercise of his rights to remain silent, to a jury trial, and to due process. The admission of Exhibit 12 violated Mr. Amaro-Sotelo's right to confront adverse witnesses. The court abused its discretion by admitting Exhibit 12 absent proper foundational testimony. Defense counsel provided ineffective assistance by failing to object to the violation of Mr. Amaro-Sotelo's confrontation right. The court's instructions violated Mr. Amaro-Sotelo's right to the presumption of innocence and his right to present a defense by calling his credibility into question based on improper grounds. For all these reasons, Mr. Amaro-Sotelo's convictions must be reversed.

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<sup>5</sup> The court instructed the jury that the exhibits related to Mr. Amaro-Sotelo's prior convictions were relevant only to the corresponding element of the unlawful possession of a firearm charge. CP 32. But a police witness also testified that Mr. Amaro-Sotelo had a prior conviction for misdemeanor assault. CP 313. The court failed to instruct the jury that it could not consider the officer's testimony in assessing Mr. Amaro-Sotelo's credibility. CP 22-48. Accordingly, instruction 7a does not cure the error here.

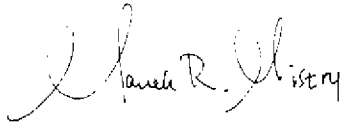
Respectfully submitted on September 8, 2014,

**BACKLUND AND MISTRY**



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## CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Toribio Amaro-Sotelo, DOC #373295  
Stafford Creek Corrections Center  
191 Constantine Way  
Aberdeen, WA 98520

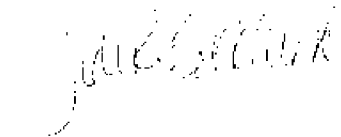
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Cowlitz County Prosecuting Attorney  
baurs@co.cowlitz.wa.us

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on September 8, 2014.



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## BACKLUND & MISTRY

**September 08, 2014 - 3:43 PM**

### Transmittal Letter

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Court of Appeals Case Number: 46107-2

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